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7 UNITED STATES DISTRICT COURT  
8 WESTERN DISTRICT OF WASHINGTON  
9 AT SEATTLE

10 SNOHOMISH COUNTY PUBLIC  
11 HOSPITAL DISTRICT NO. 1,

12 Plaintiff,

13 v.

14 HARTFORD FIRE INSURANCE  
15 COMPANY, et al.,

Defendants.

CASE NO. C17-1456JLR

ORDER ON CROSS-MOTIONS  
FOR PARTIAL SUMMARY  
JUDGMENT

16 **I. INTRODUCTION**

17 Before the court are the parties' cross-motions for partial summary judgment.  
18 (*See* Pl. MSJ (Dkt. # 24); Def. MSJ (Dkt. # 21).) The court has considered the parties'  
19 motions, their submissions in support of and in opposition to the motions, the relevant  
20 portions of the record, and the applicable law. Being fully advised,<sup>1</sup> the court GRANTS

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22 <sup>1</sup> Plaintiff Snohomish County Public Hospital District No. 1 d/b/a EvergreenHealth  
Monroe's ("EHM") requests oral argument on its motion, but the court determines that oral

1 in part and DENIES in part Plaintiff Snohomish County Public Hospital District No. 1  
2 d/b/a EvergreenHealth Monroe’s (“EHM”) motion for partial summary judgment, and  
3 DENIES Defendant Hartford Fire Insurance Company’s (“Hartford”) motion for partial  
4 summary judgment.

## 5 **II. BACKGROUND**

6 EHM is a “small public hospital in Snohomish County, Washington.” (Compl.  
7 (Dkt. # 1-1) ¶ 1.1.) This is an insurance coverage dispute related to the failure of the  
8 hydraulic cylinder—depicted directly below—in EHM’s elevator. (*Id.* ¶ 4.1.)



16 (1st Pendleton Decl. (Dkt. # 25) ¶ 2.) The court recounts below the relevant factual and  
17 procedural background.

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21 argument would not help its disposition of the motions. (*See* Pl. MSJ at 1); Local Rules W.D.  
22 Wash. LCR 7(b)(4); *see also Dredge Corp. v. Penny*, 338 F.2d 456, 462 (9th Cir. 1964) (stating  
that, as a general rule, the court may not deny a request for oral argument made by a party  
opposing a motion for summary judgment unless the motion is denied).

1   **A.   Factual Background**

2       1.   The Policy

3       On October 20, 2015, Hartford issued EHM Policy No. 10 UUN HV1618 (“the  
4 Policy”) covering November 1, 2015, to October 1, 2016. (1st Pendleton Decl. ¶ 3, Ex. 1  
5 (“Policy”) at 3-4; *see also* 1st Adams Decl. (Dkt. # 22) ¶ 2, Ex. 1.)<sup>2</sup> The Policy stated  
6 that Hartford “will pay for direct physical loss of or direct physical damage  
7 to . . . Covered Property caused by or resulting from a Covered Cause of Loss.” (Policy  
8 at 4.) Covered Property included “[p]ermanently installed machinery and equipment”  
9 (*id.*), and a Covered Cause of Loss included “direct physical loss or direct physical  
10 damage that occurs during the Policy Period . . . unless the loss or damage is excluded or  
11 limited in this policy” (*id.* at 14). The Policy specifically provided coverage arising from  
12 an “Equipment Breakdown Accident to Equipment Breakdown Property.” (*Id.* at 20.)  
13 The Policy defined an “Equipment Breakdown Accident” as “direct physical loss or  
14 direct physical damage” such as “[m]echanical breakdown, including rupture or bursting  
15 caused by centrifugal force.” (*Id.*) The Policy also defined “Equipment Breakdown  
16 Property” as “property . . . that generates, transmits or utilizes energy, including  
17 electronic communications and data processing equipment.” (*Id.*)

18       The Policy further contained a “Special Business Income Coverage Form,” which  
19 covered “the actual loss of Business Income [EHM] sustain[ed] and the actual, necessary  
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21       \_\_\_\_\_  
22       <sup>2</sup> The evidence in the record contains multiple modes of pagination. For the sake of  
consistency, the court cites the ECF page numbers unless otherwise noted.

1 and reasonable Extra Expense [EHM] incur[red] due to the necessary interruption of [its]  
2 business operations.” (*Id.* at 10.)

3 The Policy also contained two exclusions relevant here: (1) an underground  
4 vessels exclusion, and (2) a corrosion exclusion. The Policy stated that,

5 [t]he following is not Equipment Breakdown Property[:] . . . Any sewer  
6 piping, any **underground vessels** or piping, any piping forming a part of a  
7 sprinkler system or water piping other than boiler feedwater piping, boiler  
condensate return piping or water piping forming a part of a refrigerating or  
air conditioning system.

8 (*Id.* at 20-21 (bolding added).) The corrosion exclusion stated that Hartford “will  
9 not pay for loss or damage caused by or resulting from any of the following . . . Wear and  
10 tear, or change in color, texture, or finish; . . . Rust, **corrosion**, decay, or deterioration.”

11 (*Id.* at 20 (bolding added).)

## 12 2. Damage to the Hydraulic Cylinder

13 On April 6, 2016, one of EHM’s elevators stopped working properly, and EHM  
14 subsequently tendered its claim to Hartford.<sup>3</sup> (*See, e.g.*, 1st Pendleton Decl. ¶ 3, Ex. 3  
15 (“McIntosh Rep.”) at 24.) EHM sought the cost of removal, manufacture, expedited  
16 shipping, and installation of a new hydraulic cylinder. (*Id.* at 27.) EHM also sought lost  
17 business income of \$70,000.00. (*Id.*; *see also* 1st Pendleton Decl. ¶ 3, Ex. 4 (“Rog.  
18 Ans.”) at 42.)

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21 <sup>3</sup> The record is not clear as to when EHM submitted its claim to Hartford. (*See, e.g.*,  
22 McIntosh Rep. at 24.) EHM must have, however, submitted its claim sometime between April 6,  
2016—the date of the loss—and May 2, 2016—the date Brian McIntosh, a Loss Control  
Inspector for Hartford Steam Boiler (“HSB”), made “[i]ntial [c]ontact.” (*Id.*)

1 According to an investigation report by Brian McIntosh, a Loss Control Inspector  
2 for Hartford Steam Boiler (“HSB”), one of EHM’s elevators began making “a horrible  
3 noise.” (McIntosh Rep. at 25.) EHM’s maintenance department called the elevator  
4 manufacturer, ThyssenKrupp, and a technician came to EHM and filled the oil reservoir.  
5 (*See id.*) After filling the reservoir, the technician tested the elevator by raising it to the  
6 second floor “to see how long the elevator would hold its position.” (*Id.*) After only  
7 minutes, “the elevator lowered a foot.” (*Id.*) EHM then took the elevator out of service  
8 overnight, and when the elevator was checked the next morning, it had descended to the  
9 first floor. (*See id.*) EHM then “discovered that the elevator hydraulic [cylinder] had a  
10 leak.” (*Id.*) EHM removed the hydraulic cylinder “from the hole in the elevator pit after  
11 the hydraulic oil was pumped out.” (*Id.*) The hydraulic cylinder measured  
12 approximately 14 feet long and 6 inches in diameter. (*See id.*) The physical damage—  
13 depicted in the photo below—to the hydraulic cylinder was “a small hole” that “blew out  
14 of a piece of the metal cylinder.” (*Id.* at 26.)



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21 (1st Adams Decl. ¶ 4, Ex. 3 at 3.) Mr. McIntosh noted at that time that hydraulic pressure  
22 apparently caused the damage. (McIntosh Rep. at 26.) The elevator would be

1 inoperative until the hydraulic cylinder could be replaced, and because of the inoperative  
2 elevator, one of EHM's tenants had to relocate. (*Id.* at 27.)

3 On May 6, 2016, Hartford denied EHM's claim on two bases: (1) the elevator did  
4 not meet the definition of covered equipment breakdown because the hydraulic cylinder  
5 was an underground vessel; and (2) the hydraulic cylinder had corroded.<sup>4</sup> (1st Adams  
6 Decl. ¶ 3, Ex. 2 ("5/6/16 Denial") at 4; *see also* 1st Pendleton Decl. ¶ 3, Ex. 8 at 64.)  
7 Internal Hartford emails show that Hartford believed because the cylinder was "below  
8 grade," it was "underground." (1st Pendleton Decl. ¶ 3, Ex. 11 at 74.) The photo below  
9 shows the hole in the ground in which part of the cylinder was housed:



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15 (1st Adams Decl. ¶ 4, Ex. 3 at 3; *see also* 2d Pendleton Decl. (Dkt. # 36) ¶ 2  
16 (authenticating a similar image embedded in EHM's response brief); Pl. Resp. (Dkt. # 34)  
17 at 4 (depicting a similar image).) At least one Hartford agent, however, questioned that  
18 conclusion, because "regardless of location[,], a pump (hydraulic ram) simply pushes or  
19 moves liquid but does not contain or store liquid as would a vessel." (1st Pendleton Decl.  
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21 <sup>4</sup> Hartford also denied coverage for EHM's lost business income because "coverage for  
22 loss of business income would only be considered if damage occurred to property caused by or  
resulting from a covered loss." (5/6/16 Denial at 4.)

¶ 3, Ex. 12 at 78.) And as of June 28, 2016, a Hartford representative stated that it “still ha[s] no written evidence that confirms that Corrosion was the cause of the Hydraulic [Cylinder] Failure, only [ESI’s] report listing Hydraulic Pressure.” (*Id.* at 79.)

On September 1, 2016, Parker, Smith & Fleek (“PSF”), EHM’s insurance broker, responded to Mr. McIntosh’s report and Hartford’s denial of coverage. (1st Pendleton Decl. ¶ 3, Ex. 9 (“1st PSF Letter”) at 67-69.) PSF shared its “belief that the declination was issued in error” because “there were no findings during the investigation that the hydraulic . . . cylinder sustained damage relating to wear and tear, rust or maintenance issues.” (*Id.* at 68.) PSF further stated that “[n]othing in the report makes any reference of the hydraulic [cylinder] being located underground. . . . The pit is below grade but certainly not underground.” (*Id.* at 69.) Hartford responded on September 2, 2016, outlining steps for further investigation of EHM’s claim. (1st Pendleton Decl. ¶ 3, Ex. 10 at 71.)

Because EHM disputed Hartford’s conclusion, Hartford agreed to send an independent engineer to inspect the cylinder. (*See id.*) The independent engineer, Keith Cline from Engineering Systems Inc. (“ESI”), submitted a report to Hartford on September 26, 2016. (1st Pendleton Decl. ¶ 3, Ex. 3 (“ESI Rep.”) at 31-39.) Mr. Cline made a number of conclusions, including the following:

1. The elevator hydraulic cylinder leaked from a through-wall perforation in the end cap.
2. Erosion damage caused by high pressure hydraulic fluid flowing through the end cap leak location was sufficient to make determining the original leak cause impossible by visual examination alone.

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1           3. A common cause for failure in steel components such as the elevator  
2           cylinder is corrosion damage.

3           (*Id.*) In addition to his report, Mr. Cline attests that “[a]s a result of my inspection, it was  
4           my opinion then, and it is my opinion now, to a reasonable degree of certainty under the  
5           standards of my profession, that the cause of the cylinder failure was corrosion.” (Cline  
6           Decl. (Dkt. # 33) ¶ 6.) He states that “given the appearance of the hole,” he believed “the  
7           corrosion originated on the outer surface,” but that destructive testing was necessary to  
8           definitively determine the origination.<sup>5</sup> (*Id.*) On September 12, 2016, before finishing  
9           his report, Mr. Cline expressed this opinion to HSB’s Eric Snyder. (*Id.* ¶ 7.)

10           Based on ESI’s report, on October 10, 2016, Hartford again denied EHM’s claim.  
11           (1st Pendleton Decl. ¶ 3, Ex. 13 (“10/10/16 Denial”) at 82-84.) Hartford stated in its  
12           denial letter that “the engineer’s findings have confirmed that the elevator hydraulic  
13           cylinder failed as a result of corrosion damage,” and “[w]e have also confirmed that the  
14           hydraulic cylinder was located underground and is not considered Equipment Breakdown  
15           Property.” (*Id.* at 83-84.) PSF disputed Hartford’s conclusions and requested that  
16           Hartford again reconsider its coverage position. (*See* 1st Pendleton Decl. ¶ 3, Ex. 14 at  
17           86-89 (“2d PSF Letter”).)

18           On November 16, 2016, Hartford declined to reconsider its decision based on  
19           PSF’s second follow-up letter. (*See* 1st Pendleton Decl. ¶ 3, Ex. 14 (“11/16/16 Denial”)  
20           at 91.) Hartford expressly reiterated its position: “[T]here is no coverage for the loss as

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22           <sup>5</sup> “Destructive testing” involves “cutting into the cylinder, and inspecting the inside of the  
cylinder.” (Cline Decl. ¶ 6.)

1 outlined in our original declination letter sent on October 10, 2016.” (*Id.*) Hartford also  
2 stated that it had “followed up with Mark Anderson of Cozen O’Connor and [was]  
3 advised that destructive testing has been called off and will not be pursued by any of the  
4 parties to the loss.”<sup>6</sup> (*Id.*) Hartford further stated that “[t]he manufacturer, installer,  
5 Cozen O’Connor, and The Hartford have all independently inspected the cylinder and all  
6 have concluded that the damage is the result of corrosion.” (*Id.*; *see also* 1st Pendleton  
7 Decl. ¶ 3, Ex. 16 at 94 (stating in a Hartford claims note that Hartford was “not going to  
8 perform destructive testing based on the consensus reached by all parties to the loss that  
9 this was corrosion”).)

#### 10 **B. Procedural Background**

11 Based on Hartford’s denial of coverage, EHM brought suit on August 14, 2017, in  
12 Snohomish County Superior Court. (*See* Compl.) EHM asserted claims for insurance  
13 bad faith and breach of the covenant of good faith and fair dealing (*id.* ¶¶ 5.3-5.6),  
14 negligent claims handling (*id.* ¶¶ 5.7-5.9), breach of contract (*id.* ¶¶ 5.10-5.12), violation  
15 of the Washington Consumer Protection Act, RCW ch. 19.86 (*id.* ¶¶ 5.13-5.16), and  
16 violation of the Insurance Fair Conduct Act, RCW ch. 48.30 (*id.* ¶¶ 5.17-5.20). On  
17 September 26, 2017, Hartford removed the action to this court. (*See* Not. of Rem. (Dkt.  
18 # 1).) On March 22, 2018, EHM moved to amend the case scheduling order and to

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21 <sup>6</sup> Mr. Anderson and Cozen O’Connor represented EHM’s tenant that had to relocate  
22 when the elevator stopped working. (*See* 1st Pendleton Decl. ¶ 3, Ex. 16 at 94 (referring to Mr.  
Anderson as “[s]ubro coun[se]l for tenant”).)

1 amend its complaint to add HSB as a defendant. (MTA (Dkt. # 26).) The court granted  
2 that motion on April 27, 2018. (4/27/18 Order (Dkt. # 37).)

3 The parties cross-move for partial summary judgment. (*See generally* Pl. MSJ;  
4 Def. MSJ.) Hartford seeks a declaration that there is no coverage under the Policy  
5 because the Policy excludes underground vessels from coverage. (Def. MSJ at 1-2.)  
6 EHM seeks a declaration that it is entitled to coverage, and that neither the corrosion nor  
7 the underground vessels exclusion applies. (Pl MSJ at 2.) The court now addresses the  
8 motions.

### 9 III. ANALYSIS

#### 10 A. Legal Standard

11 Summary judgment is appropriate if the evidence shows “that there is no genuine  
12 dispute as to any material fact and the movant is entitled to judgment as a matter of law.”  
13 Fed. R. Civ. P. 56(a); *see Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986); *Galen v.*  
14 *Cty. of L.A.*, 477 F.3d 652, 658 (9th Cir. 2007). A fact is “material” if it might affect the  
15 outcome of the case. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). A  
16 factual dispute is “‘genuine’ only if there is sufficient evidence for a reasonable fact  
17 finder to find for the non-moving party.” *Far Out Prods., Inc. v. Oskar*, 247 F.3d 986,  
18 992 (9th Cir. 2001) (citing *Anderson*, 477 U.S. at 248-49). “[W]hen parties submit  
19 cross-motions for summary judgment, each motion must be considered on its own  
20 merits.” *Fair Hous. Council of Riverside Cty., Inc. v. Riverside Two*, 249 F.3d 1132,  
21 1136 (9th Cir. 2011) (internal quotation marks and alterations omitted).

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1       The moving party bears the initial burden of showing there is no genuine issue of  
2 material fact and that it is entitled to prevail as a matter of law. *Celotex*, 477 U.S. at 323.  
3 If the moving party does not bear the ultimate burden of persuasion at trial, it can show  
4 the absence of a dispute of material fact in two ways: (1) by producing evidence negating  
5 an essential element of the nonmoving party’s case, or (2) by showing that the  
6 nonmoving party lacks evidence of an essential element of its claim or defense. *Nissan*  
7 *Fire & Marine Ins. Co. v. Fritz Cos.*, 210 F.3d 1099, 1106 (9th Cir. 2000). If the moving  
8 party will bear the burden of persuasion at trial, it must establish a prima facie showing in  
9 support of its position on that issue. *UA Local 343 v. Nor-Cal Plumbing, Inc.*, 48 F.3d  
10 1465, 1471 (9th Cir. 1994). That is, the moving party must present evidence that, if  
11 uncontroverted at trial, would entitle it to prevail on that issue. *Id.* at 1473. If the moving  
12 party meets its burden of production, the burden then shifts to the nonmoving party to  
13 identify specific facts from which a fact finder could reasonably find in the nonmoving  
14 party’s favor. *Celotex*, 477 U.S. at 324; *Anderson*, 477 U.S. at 252.

15       The court is “required to view the facts and draw reasonable inferences in the light  
16 most favorable to the [non-moving] party.” *Scott v. Harris*, 550 U.S. 372, 378 (2007).  
17 The court may not weigh evidence or make credibility determinations in analyzing a  
18 motion for summary judgment because these are “jury functions, not those of a judge.”  
19 *Anderson*, 477 U.S. at 249-50. Nevertheless, the nonmoving party “must do more than  
20 simply show that there is some metaphysical doubt as to the material facts . . . . Where  
21 the record taken as a whole could not lead a rational trier of fact to find for the  
22 nonmoving party, there is no genuine issue for trial.” *Scott*, 550 U.S. at 380 (internal

1 quotation marks omitted) (quoting *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*,  
2 475 U.S. 574, 586-87 (1986)).

3 Furthermore, the court may consider only materials that are capable of being  
4 presented in an admissible form. *See* Fed. R. Civ. P. 56(c)(2); *Orr v. Bank of Am., NT &*  
5 *SA*, 285 F.3d 764, 773 (9th Cir. 2002). “Legal memoranda and oral argument are not  
6 evidence and do not create issues of fact capable of defeating an otherwise valid  
7 summary judgment.” *Estrella v. Brandt*, 682 F.2d 814, 819-20 (9th Cir. 1982); *see also*  
8 *Rivera v. Nat’l R.R. Passenger Corp.*, 331 F.3d 1074, 1078 (9th Cir. 2003) (“Conclusory  
9 allegations unsupported by factual data cannot defeat summary judgment.”). Nor can the  
10 plaintiff “defeat summary judgment with allegations in the complaint, or with  
11 unsupported conjecture or conclusory statements.” *Hernandez v. Spacelabs Med. Inc.*,  
12 343 F.3d 1107, 1112 (9th Cir. 2003).

### 13 **B. Cross-Motions for Summary Judgment**

14 Hartford moves for a declaration that there is no coverage for the damage to the  
15 hydraulic cylinder because the cylinder is an underground vessel excluded from coverage  
16 under the Policy. (*See* Def. MSJ.) EHM seeks summary judgment in its favor that it is  
17 entitled to coverage under the Policy and that neither the underground vessel nor the  
18 corrosion exclusion apply. (*See* Pl. MSJ.)

#### 19 1. Scope of Coverage

20 “An ‘all-risk’ policy covers any peril that is not specifically excluded in the  
21 policy,” *Nw. Bedding Co. v. Nat’l Fire Ins. Co. of Hartford*, 225 P.3d 484, 487 (Wash.  
22 Ct. App. 2010), and “generally allocate[s] risk to the insurer,” *Vision One, LLC v. Phila.*

1 *Indem. Ins. Co.*, 276 P.3d 300, 306 (Wash. 2012). “But even all-risk policies may  
2 exclude certain perils . . . .” *Nw. Bedding*, 225 P.3d at 487. The loss must also be  
3 fortuitous, a requirement comprising “three components: (a) a loss which was certain to  
4 occur cannot be considered fortuitous, and may not serve as the basis for recovery under  
5 an all-risk insurance policy; (b) in deciding whether a loss was fortuitous, a court should  
6 examine the parties’ perception of risk at the time the policy was issued; [and] (c)  
7 ordinarily, a loss which could not reasonably be foreseen by the parties at the time the  
8 policy was issued is fortuitous.” *Frank Coluccio Constr. Co., Inc. v. King Cty.*, 150 P.3d  
9 1147, 1156 (Wash. Ct. App. 2007). The fortuity showing is not particularly onerous. *See*  
10 *id.*

11 The court looks to the “language of the policy to ensure that the parties  
12 contemplated coverage for the ensuing loss.” *Vison One*, 276 P.3d at 308. Accordingly,  
13 the insured must first demonstrate that “the loss falls within the scope of the policy’s  
14 covered losses,” and the insurer must then demonstrate that “the claim of loss is  
15 excluded.” *Nw. Bedding*, 225 P.3d at 487. Thus, the court first determines whether EHM  
16 has established that the damage to the elevator falls within the scope of the Policy.<sup>7</sup>  
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18 <sup>7</sup> Hartford argues that “[t]he equipment breakdown coverage [in the Policy] is not all risk,  
19 but instead defines a specific peril,” such that EHM has the “burden to show that there was an  
20 equipment breakdown accident to equipment breakdown property in order to meet the insuring  
21 agreement of the additional coverage.” (Def. Resp. (Dkt. # 31) at 8.) Hartford contends that  
22 EHM cannot make that showing because the hydraulic cylinder is an expressly excluded  
underground vessel. (*See id.*) However, even if the court framed the issue in the slightly  
different manner Hartford advances, the result is the same: EHM must demonstrate that there is  
coverage under the Policy, and the court then determines whether there is a genuine dispute of  
material fact regarding whether the cylinder constitutes an underground vessel.

1 The Policy covered “direct physical loss or direct physical damage to Covered  
2 Property,” which the Policy further defined as “[p]ermanent installed machinery and  
3 equipment.” (Policy at 4.) The Policy also covers “Equipment Breakdown Accident to  
4 Equipment Breakdown Property,” which extends to “[m]echanical breakdown, including  
5 rupture or bursting caused by centrifugal force” to “property . . . that generates, transmits  
6 or utilizes energy.” (*Id.* at 20.) The damaged hydraulic cylinder falls within both of  
7 those provisions because it constitutes permanent installed machinery and is property  
8 utilizing energy that suffered a mechanical breakdown. (*See* Pl. MSJ at 11; *see also* Def.  
9 Resp. at 8 (stating that EHM has the burden of proving coverage and arguing only that  
10 EHM cannot demonstrate that there was an equipment breakdown accident to equipment  
11 breakdown property—i.e., the hydraulic cylinder—because the cylinder is an  
12 underground vessel and therefore not equipment breakdown property).)

13 In addition, the loss was fortuitous. (*See* Pl. MSJ at 11.) There is no indication in  
14 the record that this kind of event was “certain to occur” or perceived as a risk at the time  
15 Hartford issued the Policy. *Frank Coluccio Constr.*, 150 P.3d at 1156. And based on the  
16 evidence before the court, the loss “could not reasonably be foreseen by the parties at the  
17 time the policy was issued.” *Id.* Having found that the Policy covers the damage, the  
18 court now determines whether the two exclusions at issue nevertheless bar coverage.

## 19 2. Underground Vessels Exclusion

20 Whether the underground vessels exclusion applies depends on what the term  
21 “underground vessel” means. (*Compare* Def. MSJ at 9, *with* Pl. MSJ at 2.) Hartford  
22 argues that the hydraulic cylinder is an underground vessel because it “sits in an earthen

1 hole extending 14 feet below the surface of the ground” and “is cylindrical in shape . . . [,]  
2 of tight construction . . . and holds both the piston, and liquid.” (Def. MSJ at 9.) Under  
3 Hartford’s characterization, coverage is excluded. (See Policy at 20-21.) EHM, for its  
4 part, argues that the hydraulic cylinder is not an underground vessel for three reasons.  
5 (Pl. MSJ at 2.) First, “the elevator’s component parts cannot be dissected for purposes of  
6 applying a coverage exclusion.” (*Id.*) Second, even if each part were analyzed  
7 separately, the cylinder “protrudes above the floor in an open elevator shaft” and  
8 therefore is not underground. (*Id.*) And third, Washington law requires the court to  
9 construe the coverage exclusion strictly against Hartford. (*Id.*)

10 When a policy does not define a term, the court gives that term “its ordinary  
11 meaning.” *Vision One*, 276 P.3d at 306. “To determine the plain meaning of an  
12 undefined term, courts often refer to standard English dictionaries.” *Int’l Marine*  
13 *Underwriters v. ABCD Marine, LLC*, 313 P.3d 395, 400 (Wash. 2013) (referencing  
14 Webster’s Third New International Dictionary). “[T]he fact that a term is undefined does  
15 not automatically render a provision ambiguous.” *Id.* Once the court has interpreted the  
16 policy, the court then construes exclusions strictly against the insurer. *Vision One*, 276  
17 P.3d at 306; see also *ABCD Marine*, 313 P.3d at 402 (“After interpreting an insurance  
18 policy, the court must construe it, i.e., determine its legal effect.”).

19 The court first analyzes the question common to both motions—whether the  
20 hydraulic cylinder is an underground vessel. Both parties agree that the Policy does not  
21 define that phrase. (See Pl. MSJ at 15; Def. MSJ at 8.) Thus, the court must give the  
22 term its plain and ordinary meaning and refers to Webster’s Third New International

1 Dictionary to do so. *See Webster’s Third New Int’l Dictionary* (2002). The dictionary  
2 defines “underground” as “being, growing, or situated below the surface of the ground.”  
3 *See Underground*, Webster’s Third New Int’l Dictionary (2002). It defines “vessel” as “a  
4 hollow and usu[ally] cylindrical or concave utensil (as a hogshead, bottle, kettle, cup, or  
5 bowl) for holding something and esp[ecially] a liquid : a receptacle of tight construction  
6 sometimes as distinguished from one (as a basket) of slack or open construction.” *See*  
7 *Vessel*, Webster’s Third New Int’l Dictionary (2002).

8       Informed by those definitions, the court concludes that the hydraulic cylinder is  
9 not an underground vessel and accordingly, that the exclusion does not apply. As both  
10 parties acknowledge, only part of the cylinder is in a hole extending below ground. (*See*  
11 Pl. MSJ at 18; Def. MSJ at 9.) For example, EHM’s Plant Operations Manager, Damien  
12 Fannin, states that “[b]efore it was removed for inspection, the hydraulic cylinder sat in a  
13 steel-lined hole at the bottom of the elevator shaft.” (Fannin Decl. (Dkt. # 35) ¶¶ 2-3.)  
14 According to Mr. Fannin, “[r]oughly two feet of the hydraulic cylinder protruded above  
15 the floor, and the remaining twelve feet was in the steel-lined hole.” (*Id.* ¶ 3.) Because  
16 the entire cylinder is not situated below ground, however, it stretches the ordinary  
17 meaning of the word “underground” too far to characterize the cylinder as “being . . . or  
18 situated below the surface of the ground.” *See Underground*, Webster’s Third New Int’l  
19 Dictionary (2002); *see also Leanderson v. Farmers Ins. Co. of Wash.*, 43 P.3d 1284, 1286  
20 (Wash. Ct. App. 2002) (internal quotation marks omitted) (“[E]xclusions from coverage  
21 of insurance will not be extended beyond their clear and unequivocal meaning.”).

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1 Instead, only a portion of the cylinder extends below the surface of the ground, and  
2 therefore the hydraulic is not “underground” as that word is plainly understood.

3 In addition, the hydraulic cylinder cannot be considered a “vessel.” It is simply  
4 not a “utensil” similar to “a hogshead, bottle, kettle, cup, or bowl.” *Vessel*, Webster’s  
5 Third New Int’l Dictionary (2002). In addition, although the cylinder holds liquid—  
6 hydraulic fluid—it does so not because its purpose is to hold liquid but because the  
7 cylinder requires that liquid for its operation. *Cf. id.* (suggesting that the purpose of a  
8 “vessel” is to hold something). Thus, the underground vessel exclusion does not apply  
9 because the plain meanings of those words—in isolation and read together—bear no  
10 resemblance to the hydraulic cylinder.

11 The phrases surrounding the term “underground vessel” further bolster the court’s  
12 interpretation of that phrase. The entire paragraph that includes the underground vessel  
13 language excludes from coverage:

14 Any sewer piping, any underground vessels or piping, any piping forming a  
15 part of a sprinkler system or water piping other than boiler feedwater piping,  
16 boiler condensate return piping or water piping forming a part of a  
17 refrigerating or air conditioning system.

18 (Policy at 20-21.) The exclusion describes multiple kinds of piping but does not address  
19 an apparatus similar to the hydraulic cylinder. (*See id.*); *see also supra* p.2 (showing a  
20 picture of the hydraulic cylinder). Thus, the surrounding language in the exclusion  
21 provides no support for interpreting “underground vessel” as encompassing the hydraulic  
22 cylinder here.

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1 For those reasons, the court denies Hartford’s motion for partial summary  
2 judgment, and grants EHM’s motion on this issue. The court now turns to EHM’s  
3 motion for a ruling that the corrosion exclusion does not bar coverage.

4 3. Corrosion Exclusion

5 As a preliminary matter, EHM argues that because the parties agreed “to forgo  
6 reply briefs” and EHM needed “to avoid filing two contemporaneous summary judgment  
7 motions,” EHM “will not have an opportunity to respond to Hartford’s position on the  
8 ‘corrosion’ exclusion.” (Pl. Resp. (Dkt. # 34) at 17.) Thus, EHM requests that the court  
9 disregard any attempt by Hartford to “create an issue of fact with declarations from its  
10 adjusters or expert investigators.” (*Id.*) The court will not do so.

11 Assuming EHM meets its initial burden of demonstrating a lack of evidence  
12 supporting Hartford’s reliance on the corrosion exclusion, Hartford then has the burden  
13 of coming forth with evidence demonstrating that it in fact had a basis for relying on that  
14 exclusion. *See Celotex*, 477 U.S. at 324; *Anderson*, 477 U.S. at 252. Furthermore, EHM  
15 waived its right to file a reply brief and cannot now request that the court disregard  
16 Hartford’s evidence because EHM could not respond. *Cf.* Local Rules W.D. Wash. LCR  
17 7(b)(3) (expressly contemplating that the moving party may elect not to file a reply brief  
18 and that the court would then decide a motion without the benefit of that filing). The  
19 court now examines whether there is a genuine dispute of material fact regarding whether  
20 either of Hartford’s investigations determined corrosion caused the loss.

21 EHM contends that neither of the two investigations Hartford relied on in  
22 applying the corrosion exclusion—Mr. McIntosh’s initial report and ESI’s later report—

1 determined that corrosion caused the damage to the hydraulic cylinder. (Pl. MSJ at 12.)  
2 Thus, EHM asserts that there is no evidence supporting Hartford's denial on that basis.  
3 (*Id.*) Hartford argues, however, that there is a genuine dispute of material fact regarding  
4 the corrosion issue, and therefore judgment as a matter of law is inappropriate. (Def.  
5 Resp. at 6-8.)

6 EHM is correct that Mr. McIntosh's report fails to support Hartford's position on  
7 corrosion. Mr. McIntosh's report stated that "it appears that the hydraulic pressure  
8 caused a small hole which blew out a piece of the metal cylinder." (McIntosh Rep. at  
9 25.) Indeed, Hartford concedes that "Mr. McIntosh did not mention corrosion as a cause  
10 of the loss," arguing instead that his "report did not foreclose the possibility that  
11 corrosion had weakened the cylinder, such that allowed the hydraulic failure to occur."  
12 (Def. Resp. at 3.) Were only Mr. McIntosh's report before the court, there would be no  
13 genuine dispute of material fact regarding corrosion as a cause of damage to the hydraulic  
14 cylinder.

15 However, Hartford presents evidence sufficient to overcome summary judgment.  
16 In his report, Mr. Cline identified corrosion as a likely cause of the damage. (ESI Rep. at  
17 38.) Specifically, he stated that (1) a "common cause of failure in steel components such  
18 as the elevator cylinder is corrosion damage" and (2) the cylinder's "general appearance  
19 would indicate the damage mechanism that caused the perforation and subsequent leak

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1 likely originated on the outer surface of the cylinder.”<sup>8</sup> (*Id.* at 37.) However, he noted  
2 that a visual examination—which he had undertaken—was insufficient to conclusively  
3 determine the cause of the damage and that destructive testing “would be required to  
4 positively determine the cause” of the loss. (*Id.* at 38.) He further explained that the  
5 destructive testing would have confirmed “that the corrosion originated on the outer  
6 surface,” not whether corrosion occurred at all. (Cline Decl. ¶ 6 (stating that “the cause  
7 of the cylinder failure was corrosion,” but that he “could not positively confirm that the  
8 corrosion originated on the outer surface as opposed to the inner surface”).) Before Mr.  
9 Cline finished his report, he notified Mr. Snyder that “this is an issue dealing with  
10 corrosion,” which Mr. Snyder memorialized in his notes. (2d Adams Decl. (Dkt. # 32),  
11 Ex. 2 at 4; *see also* Cline Decl. ¶ 7.)

12 In addition, Hartford’s Brian Yannuzzi spoke with a ThyssenKrupp representative  
13 and memorialized the conversation in his notes by stating that “‘electrolysis ha[d] likely  
14 eaten away at the cylinder wall.’” (Def. Resp. at 6 (quoting 2d Adams Decl. ¶ 1, Ex. 1 at  
15 6).) Thus, although there are some inconsistencies in the record, ESI’s report and Mr.  
16 Yannuzzi’s claim notes demonstrate a genuine dispute of material fact as to whether  
17 Hartford’s investigations supported corrosion as a source of the damage.<sup>9</sup>

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19 <sup>8</sup> In response to EHM’s motion, Mr. Cline states that “when [he] referred to the ‘damage  
20 mechanism’ that caused the perforation and subsequent leak that likely originated on the surface,  
21 [he] was referring to corrosion.” (Cline Decl. ¶ 8.)

22 <sup>9</sup> For example, Hartford’s claim notes reflect that a representative stated on June 28,  
2016, “[w]e still have no written evidence that confirms that Corrosion was the cause of the  
Hydraulic [Cylinder] Failure, only [Mr. McIntosh’s] report listing Hydraulic Pressure.” (1st  
Pendleton Decl. ¶ 3, Ex. 12 at 78.) However, ESI issued its report in September 2016 and  
concluded that corrosion likely caused the damage. (*See* ESI Rep.; Cline Decl. ¶ 6.)

1 EHM's arguments to the contrary are unavailing. For example, EHM argues that  
2 Mr. Yannuzzi's supervisor, Curt Coffman, determined that the cylinder had "rusting out"  
3 after "reviewing a handful [of] photographs while sitting at his desk." (Pl. MSJ at 13.)  
4 EHM contends that "Mr. Coffman's unsupported and uninformed finding of corrosion  
5 does not create an issue of material fact." (*Id.*) But even if Mr. Coffman's opinion is  
6 insufficient, the findings in Mr. Cline's report and Mr. Yannuzzi's claim notes are  
7 sufficient at this stage of the proceedings to demonstrate a genuine dispute of material  
8 fact regarding whether Hartford's investigation supported relying on the corrosion  
9 exclusion.<sup>10</sup> Furthermore, although Hartford did not definitively pin down corrosion as  
10 the cause, the investigators' conclusions were based on their observations, experience,  
11 and expertise. *Cf. Commonwealth Ins. Co. v Maryland Cas. Co.*, No. C02-2222MJP,  
12 2005 WL 1288000, at \*6 (W.D. Wash. May 13, 2005). Indeed, the fact that Hartford did  
13 not conduct the destructive testing provides no basis—at this stage of the proceedings and  
14 as EHM presents its motion—for entry of summary judgment. (*See* Cline Decl. ¶ 6  
15 (stating that "the cause of the cylinder failure was corrosion," but that he "could not  
16 positively confirm that the corrosion originated on the outer surface as opposed to the  
17 inner surface").) Thus, Hartford has demonstrated a genuine dispute of material fact  
18 regarding whether the investigations revealed a basis for invoking the corrosion

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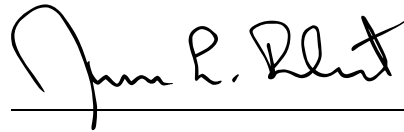
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22 <sup>10</sup> EHM also states that "Hartford cannot carry its heavy burden of demonstrating  
applicability of the corrosion exclusion by relying on ESI's speculative statements." (*Id.* at 14.)  
However, Hartford's burden in response to EHM's initial showing is not to demonstrate that the  
corrosion exclusion in fact applies and bars coverage, but only to demonstrate a genuine dispute  
of material fact. *See Celotex*, 477 U.S. at 324; *Anderson*, 477 U.S. at 252.

1 exclusion. The court therefore denies EHM's motion for summary judgment on this  
2 issue.

3 **IV. CONCLUSION**

4 For the foregoing reasons, the court DENIES Hartford's motion for partial  
5 summary judgment (Dkt. # 21) and GRANTS in part and DENIES in part EHM's motion  
6 for partial summary judgment (Dkt. # 24).

7 Dated this 15th day of May, 2018.

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10 JAMES L. ROBART  
11 United States District Judge  
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